CASE NO.: 15-13224

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION,

Petitioner/Cross-Respondent,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD
REGION 12
CASE NOS. 12-CA-026644 and 12-CA-026811

BRIEF OF PETITIONER/CROSS-RESPONDENT G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION

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I. CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation, certifies that the following listed parties have an interest in the outcome of this case:

1. Cherof, Edward M. (Attorney for Petitioner/Cross-Respondent)
2. Diaz, Margaret J. (Regional Director, National Labor Relations Board, Region 12)
3. Frazier, Thomas (Charging Party)
4. G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation (Petitioner/Cross-Respondent) (GFSZY)
5. Hirozawa, Kent Y. (Member)
6. Jackson Lewis P.C. (Attorneys for Petitioner/Cross-Respondent)
7. Mack, Cecil (Charging Party)
8. Miscimarra, Phillip A. (Member)
9. National Labor Relations Board (Respondent/Cross-Petitioner)
10. Pearce, Mark Gaston (Chairman)
11. Plass, Shelley B. (Counsel for the Acting General Counsel, National Labor Relations Board)

12. Schudroff, Daniel D. (Attorney for Petitioner/Cross-Respondent)

13. Schwartz, Jeffrey A. (Attorney for Petitioner/Cross-Respondent)

14. Spitz, Jonathan J. (Attorney for Petitioner/Cross-Respondent).

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), and Fed. R. App. P. 26.1, G4S identifies the following subsidiaries, conglomerates, affiliates and parent corporations:

1. G4S Regulated Security Solutions is a division of G4S Secure Solutions (USA) Inc. G4S Secure Solutions (USA) Inc. is a wholly-owned subsidiary of G4S Holding One, Inc. ("G4SHO"), a Delaware corporation.

2. G4SHO is a wholly owned subsidiary of G4S US Holdings Limited (G4SUSH), a British company. G4SUSH is a wholly owned subsidiary of G4S Corporate Services Limited (G4SCS), a British company. G4SCS is a wholly owned subsidiary of G4S plc, a British company publicly traded on the London Stock Exchange. It is also publicly traded on the Over the Counter (OTC) Exchange in the United States using the ticker symbol GFSZY.

II. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary because the National Labor Relations Board consistently has ignored or misconstrued record evidence and controlling precedent in stretching to extend coverage of the National Labor Relations Act ("Act") to individuals who, under Board and Circuit Court precedent, should be excluded as supervisors not covered by the Act. This issue is of great importance to all employers, as supervisors owe undivided loyalty to their employer and do not have the protected right to engage in collective bargaining or other protected activities under the Act. The gravity of this issue is particularly pronounced in the instant case, where the employer relies on the putative supervisors to oversee a quasi-military security force tasked with securing a nuclear power plant. Thus, their undivided loyalty is critical.

The Courts, including this Court, consistently have questioned the Board's disingenuous attempts to deny supervisory status, specifically where the Board disregards unrebutted testimony and record evidence undermining its conclusions. See, e.g., Lakeland Health Care Assocs., LLC v. NLRB, 696 F.3d 1332, 1335 (11th Cir. 2012).

III. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation ("G4S" or "Employer") transacts business within this judicial circuit, as defined in 28 U.S.C. § 41. On July 17, 2015, G4S timely filed its Petition for Review of the Board's June 25, 2015 Decision and Order issued pursuant to 29 U.S.C. § 151 et. seq.

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A. Whether the National Labor Relations Board ("Board" or "NLRB") erred in overturning the trier of fact's finding that Thomas Frazier ("Frazier") and Cecil Mack ("Mack") were supervisors not protected by the National Labor Relations Act ("Act")?

B. Whether the Board applied the wrong standard and therefore erred in finding Frazier and Mack were discharged because they engaged in protected concerted activity?

C. Whether the Board erred in failing to find Frazier and Mack would have been discharged in the absence of participation in protected, concerted activity?

VII. STATEMENT OF CASE

A. Procedural History

Frazier and Mack were employed as Lieutenants at G4S' facility at Turkey Point, Florida City, Florida. (V.III, 12, at 7.)[1] G4S suspended Mack on February 2, 2010 and discharged him on February 22, 2010. (Id.) G4S suspended Frazier on February 12, 2010, and terminated him on February 15, 2010. (Id.)

Frazier and Mack filed charges on February 22, 2010, and July 29, 2010, respectively. (Id.) In their charges, Frazier and Mack alleged, *inter alia*, G4S

[1] "V.III, 12 at ___" refers to the September 28, 2012 decision at 12 in V.III of the Agency Record.

violated Section 8(a)(1)[2] of the Act by discharging them in retaliation for engaging in protected concerted activity, such as raising complaints on behalf of subordinate officers. (Id.) A hearing was held on April 4-6, 2011. (Id.)

In a decision dated June 27, 2011, Administrative Law Judge ("ALJ") William N. Cates found Frazier and Mack were supervisors as defined by Section 2(11) of the Act. (Id.) Given this finding, ALJ Cates dismissed the Complaint, finding it unnecessary to address alleged violations of Section 8(a)(1). (Id.) The Acting General Counsel filed Exceptions. In a Decision and Order dated September 28, 2012, the Board overruled the ALJ's decision, finding Charging Parties were statutory employees and remanding the case for a supplemental decision regarding alleged violations of Section 8(a)(1). (Id. at 1-4.)

On November 16, 2012, the ALJ found the Employer unlawfully discharged Frazier and Mack. (V.III, 21, at 3-7.)[3] On April 30, 2013, the NLRB affirmed that decision. (Id. at 1-2.)

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[2] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 of the Act, 29 U.S.C. § 157, provides:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[3] "V.III, 21 at ___" refers to the April 30, 2013 Decision at 21 in V.III of the Agency Record.

Thereafter, G4S filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. In light of National Labor Relations Board v. Noel Canning, et. al. 134 S. Ct. 2550 (2014), which invalidated Board decisions between January 2012 and August 2013, the Court remanded the case for further proceedings.

On June 25, 2015, the Board issued a decision affirming its earlier decisions. (V.III, 24.)[4] On July 17, 2015, G4S filed this Petition for Review. On August 27, 2015, the NLRB filed its Cross-Application for Enforcement.

B. Pertinent Facts

G4S provides security services to Florida Power & Light at the Turkey Point nuclear power plant. Turkey Point contains numerous buildings and structures spread over thousands of acres. (V.I, Tr. 73-74, 315-317.)[5]

1. G4S Operations at Turkey Point.

G4S employs approximately 235 individuals at Turkey Point, with its "military-type"[6] force broken down into five shifts, including four active duty shifts and one training shift. Each shift has approximately 36 security officers. Security officers are supervised by, and report to, seven field supervisors holding

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4 "V.III, ___" refers to the June 25, 2015 Decision at 24 in V.III of the Agency Record.

5 "V.I Tr. ___" refers to the transcript of the April 4-6, 2011 Hearing.

6 V.III, 24 at 4.

the rank of lieutenant. Approximately five officers report to each lieutenant. However, a lieutenant may supervise up to 20 officers at a given point, and the number of security officers on a shift may swell to as many as 47. Lieutenants report to the captain of their shift who, in turn, reports to the Operations Coordinator (Juan Rodriguez) and the Project Manager (Mike Mareth ("Project Manager" or "Mareth"). (V.I, Tr. 216, 315-317; Organization Chart, V.II, EE 13.)[7]

2. Frazier and Mack's Supervisory Responsibilities.

a. Overview.[8]

Frazier and Mack were field supervisors/lieutenants. Frazier was hired as a security officer in 1989. Mack was hired as a security officer in 2002. Both were promoted to lieutenant in 2003. (V.I, Tr. 153, 155, 271.)

As field supervisors, lieutenants' primary responsibility is to provide oversight and direction to security officers. (V.I, Tr. 318.) Lieutenants do not regularly perform security officer duties, but spend most of their time observing bargaining unit employees[9] and correcting observed deficiencies. Frazier admitted

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[7] "V.II, EE ___" refers to Employer's Exhibits entered into the record at the April 4-6, 2011 Hearing.

[8] A related case is the Board's 2005 decision in Wackenhut Corp., 345 NLRB 850, 855 (2005), which held lieutenants at the Turkey Point facility were not statutory supervisors. However, as Member Miscimarra explained, "much has changed since the record in that case was created in 2004." (V.III, 24, at 7.)

[9] These employees include security officers who are represented by Local 610 of the Security Police and Fire Professionals of America. (V.I, Tr. 240.)

he performed security officer duties only once or twice per month, and less frequently towards the end of his employment. (V.I, Tr. 208.) Lieutenants also issue weapons to officers, inventory equipment, perform post inspections, handle alarm system operations, relieve security officers who are ill or fatigued, and ensure officers are fit for duty. (V.I, Tr. 272, 338-339.)

Lieutenant duties are set forth in a job description. The procedure containing the description states: "this procedure provides guidance to Security Field Supervisors for performing supervisory functions of Security Officers manning Security posts and assisting the Security Shift Supervisor in carrying out daily Security operations." (Security Force Instruction 1106, § 1.1, V.II, GCE 33.)[10] Among other functions, lieutenants ensure operations comply with procedures, ensure only qualified officers are assigned to posts and understand the requirements of their post, ensure officers properly perform their duties and correct any deficiencies in officers' behavior, attitude or attentiveness. (Id. at §§ 4.1.3, 4.1.1.0, 4.1.1.11. 4.1.14 and 4.1.21.) Lieutenants may be relieved only by other lieutenants or a captain. (Id. at § 3.2.)

Along with other lieutenants (and captains), Frazier and Mack were issued a number of documents which documented their supervisory responsibilities, and which they reviewed and signed to acknowledge their understanding of those

[10] "V.II, GCE ___" refers to General Counsel's Exhibits entered into the record at the April 4-6, 2011 Hearing.

responsibilities. For example, as Frazier and Mack understood, they were required to "[u]se coaching techniques . . . , counseling and progressive discipline to correct unprofessional conduct and poor job performances," "lead by example" and "keep issues discussed between supervisors confidential." (Supervisory Requirements, V.II, EE 1 and 7, §§ 3, 10 and 13.) In a Leadership Pledge, Frazier and Mack agreed to "[b]e ever observant to possible changing work place behaviors of direct reports under [their] command;" "enforce policies [and] procedures;" "listen effectively and respond appropriately to . . . the direct reports under [their] command;" "[u]se a positive, non-threatening communication style with all [their] direct reports," and "develop, coach, mentor and train those direct reports assigned to [their] command." (Leadership Pledge, V.II, EE 2 and 8.)

Written evaluations of Frazier and Mack further reflected supervisory responsibilities. (Performance Objectives and Development Plan at 2, §V(1), V.II, GCE 8; EE 11 ("Develops employees through job coaching/mentoring and performance feedback;" "Encourage/reinforce a culture that invites open/honest feedback and [a]ct positively on that feedback;" "Effectively promote use of Corrective Action Program;" and "Effectively communicate expectations and provide adequate oversight to ensure projects are completed as expected.").)

b. Frazier and Mack Had The Authority To Exercise Independent Discretion in Disciplining Subordinates.

It is undisputed lieutenants are responsible to ensure the quality of work performed by the officers who report to them. (V.I, Tr. 157-158, 330.) If a lieutenant does not adequately do so, he or she may be coached, disciplined, demoted or terminated. (V.I, Tr. 331, 335.) A lieutenant may also receive a poor evaluation, which may affect future promotions. (V.I, Tr. 335-336.)

Contrary to the Board's unsupported finding, lieutenants have the authority to issue disciplinary actions. (V.I, Tr. 219.) The record reflects they may discipline independently and without any involvement of higher management. (V.I, Tr. 322, 328, 379.) As explained in G4S' Progressive Discipline Policy, G4S' "supervisors are responsible for administering this policy as it applies to employees under their supervision . . ." (V.II, GCE 17, §3.2.) Supervisors, including lieutenants, have authority to issue oral counselings under step 1 of the progressive discipline system, written disciplinary counselings under step 2 and written disciplinary counselings and suspensions up to two days under step 3. (Id. at § 4.5 - 4.7; V.I, 322.)

Lieutenants have exercised disciplinary authority, as evidenced by eight (8) disciplinary counselings in the record. Lieutenants have issued oral warnings, written warnings and 1-day suspensions to security officers under the Progressive

Discipline Policy and a separate Attendance Policy (for attendance related infractions and property damage). (V.II, EE 16; V.I, 326; V.II, GCE 18.)

Discipline issued by lieutenants constitutes the initial steps in a progressive disciplinary system which may result in further consequences to employees and their job status, including suspension and termination. (V.II, GCE 17, 3-4, 10.) Thus, but for Level 1 offenses (which justify termination for the first offense), security officers will suffer more severe penalties if they commit infractions for which lieutenants previously disciplined them. (V.I, Tr. 323.)

c. Frazier and Mack Evaluated, Directed And Assigned Work to Subordinates.

Commencing in 2008, lieutenants have evaluated security officers who regularly report to them. (V.I, Tr. 84, 205, 295, 328.) The evaluation process consists of an annual performance review and a quarterly one-on-one process. (V.I, Tr. 84, 205-206; V.II, EE 4 and 10.) Lieutenants have regularly and consistently performed these evaluations without consulting with others. These are the only evaluations security officers receive. (V.I, Tr. 84-85, 88-89, 206-207, 295-296, 330.)

Evaluations completed by lieutenants are reviewed if a security officer seeks a promotion, and impact the chance of obtaining that promotion. (V.I, Tr. 220, 329-330; Promotion Policy, V.II, EE 17, §§ 4.10, 4.13.) Mareth identified five security officers who recently were promoted based upon their lieutenants'

evaluation: Security Officers Suarez, Donato, Clarke, and Napier. This is undisputed. (V.I, Tr. 333, 337-338.)

If a lieutenant fails to properly train subordinates, the lieutenant is responsible for substandard performance which may result. (V.I, Tr. 333). Four lieutenants have been counseled on their failure to conduct drills for security officers, jeopardizing the lieutenants' promotional advancement. (V.II, EE 18 at 1-3, 7.)

Lieutenants have the authority to transfer security officers between posts, and need not consult a superior before doing so. (V.I, Tr. 217-218.) This is not insignificant, as some security officers believe certain posts preferable. (V.I, Tr. 217.)

d. Other Indicia of Supervisory Status.

Approximately once per month, upper management meets only with lieutenants and captains before or after a "shift briefing." (V.I, Tr. 216-217, 342-343.) In addition, during their 5-week training cycle, lieutenants and captains participate in regular training sessions without security officers. (V.I, Tr. 217.) Newly promoted lieutenants receive an additional week of initial training and two weeks leadership development. Security officers do not receive this training. (V.I, Tr. 111, 344.)

The lowest paid lieutenants receive at least $4.00 per hour more than the highest paid security officers. (V.I, Tr. 342.) In addition, G4S has an incentive bonus program under which lieutenants (and captains) are eligible for an annual bonus of $1,400.00, while security officers may only earn up to $1,120.00. (V.II, EE 44 at 1.) There also is a different formula to determine the bonus for lieutenants (and captains) than that applied to security officers, including a separate category based on the absenteeism of the security officers under the command of the lieutenants. (Id. at 2, 8.) Lieutenants also receive a higher life insurance benefit. (V.I, Tr. 215-216.)

Lieutenants evaluate security officers and conduct one-on-one reviews on a quarterly basis. Captains evaluate lieutenants and conduct one-on-one reviews of the lieutenants on a monthly basis. (V.I, Tr. 84.)

As explained by Mareth, G4S would not be able to meet contractual obligations if lieutenants were not considered supervisors. This would leave one captain directly overseeing at least 43 individuals – 36 security officers plus seven lieutenants. In light of the number of individuals to be supervised, and the thousands of acres and numerous buildings and facilities to be overseen, G4S could not operate with such a ratio of supervisors to employees. (V.I, Tr. 319, 348.)

It is uncontroverted G4S considers lieutenants to be supervisors and holds them out as management. Frazier and Mack admit this and identified themselves

as "supervisors." (V.I, Tr. 225, 304; V.II, EE 2 at 2; V.II, EE 8 at 2.) The Local Union president also referred to Frazier and Mack as "supervisors" and admitted security officers' first line of reporting is to lieutenants, not captains. (V.I, Tr. 252, 257.)

3. G4S Fosters An Environment Designed To Encourage Employees (and Supervisors) To Bring Issues To Management's Attention.

G4S has numerous processes and procedures under which employees are encouraged to bring issues to the attention of management, including every issue allegedly raised by Frazier and Mack, such as substandard bathroom facilities, uncomfortable chairs and vests, and insufficient water. (V.I, Tr. 349-351, 391.) Frazier and Mack claim they were discharged because they raised these issues on behalf of their subordinate officers. The Company's commitment to a "Safety Conscious Work Environment" ("SCWE") evidences otherwise.

Under SCWE, all "employees are responsible for maintaining a questioning attitude and promptly notifying [m]anagement of all concerns and issues that relate to Nuclear Safety." (V.II, EE 19 at 2.) "[A] SCWE is an environment in which employees feel free to raise issues both to their own management and the NRC [Nuclear Regulatory Commission] without fear of retaliation and in which those issues are prioritized and promptly resolved with feedback to the employee." (V.II, EE 20 at 3 (page 2 of the copied handbook).) As Frazier testified, SCWE "is a work environment where people are not afraid to bring concerns to you for

fear of retaliation or discrimination." (V.II, EE 3 at 3.) Mareth explained the scope of SCWE is extremely broad and includes virtually any issue of concern to an employee. (V.I, Tr. 350-351.)

Under SCWE, lieutenants and other supervisors are required to relay issues raised by security officers up the chain and, if possible, attempt to resolve those issues independently. (V.I, Tr. 89-91, 225, 319.) Lieutenants (and captains) are further "responsible to maintain open communication with the security personnel under their command and receive and address concerns and issues enthusiastically and work to promptly resolve them." (V.II, EE 19 at 2; V.I, Tr. 352-353.) Because of their role in creating SCWE, lieutenants receive an additional handbook and supplemental training. (V.I, Tr. 356-357; V.II EE 21.) As explained in the handbook, supervisors must encourage their employees to raise issues and supervisors must act on those issues. (V.II, EE 21 at 3-16; V.I, Tr. 356-357.)

As part of SCWE, G4S conducts quarterly surveys of groups of 25 employees, from security officers up to Project Manager. (V.I, Tr. 353-354.) Employees provide anonymous answers to questions concerning whether they feel they "can discuss issues with [their] supervisors and management knowing that [their] input will remain confidential" and whether "site management supports [SCWE]." (V.II, EE 22 at 2.) Employees also may anonymously identify other

issues of concern. (Id. at 3; V.I, Tr. 353-354.) Based on the results of the surveys, each nuclear facility at which G4S provides security services receives a score. (V.I, Tr. 353-354.) If the score is inadequate, the facility must develop a corrective action plan. (V.I, Tr. 356.)

In about 2009, Mareth and Leadership Development Manager Karen Bower MacDonald determined they needed to do more to help employees understand SCWE. (V.I, Tr. 108, 369.) MacDonald created a PowerPoint which was presented in June 2009. Mareth (or Operations Manager Rodriguez) held Question and Answer Sessions with employees to solicit issues of concern. (V.II, EE 24, 26; V.I, Tr. 372.)

Mareth, MacDonald and Rodriguez then prepared a list of issues, called "The First 48." (V.I, Tr. 370.) The list is a "living document," revised over time to reflect progress on various issues, first posted in the fourth quarter of 2009. (V.I, Tr. 370-371; V.II, EE 25-26, 46.) Many of the issues supposedly raised by Frazier and Mack appear in The First 48. (V.I, 370-371; V.II, EE 25 and 46 at #29 ("Replace current vest with a more breathable one"), #34 ("Ensure 'Porta-lets' are clean"), #36 ("replace the North End port-o-let with a quality facility")).

In December 2009, G4S provided to employees a document outlining actions it had taken in the last half of 2009 as part of these additional efforts. (V.I, Tr. 371-372; V.II, EE 26.)

SCWE not only is important to G4S, it also is required by G4S' contract with Florida Power and the NRC. (V.I, Tr. 107, 350-351.) Pursuant to the contract, if G4S is not adequately creating an environment where employees are comfortable raising issues of concern, G4S is paid less. (V.I, Tr. 351.) In fact, the Project Manager's compensation is tied to SCWE. (V.I, Tr. 352.)

In addition to SCWE, there are other processes and procedures under which employees regularly raise various issues of concern. First, employees can file Condition Reports (CRs) as part of the Correction Action Program (CAP), raising virtually any issue, including each of the issues allegedly raised by Frazier and Mack. (V.I, Tr. 175, 380-381.) Numerous employees and supervisors, including lieutenants, submitted condition reports on a variety of issues. (V.I, Tr. 381.)

In addition, G4S conducts Safety Meetings at which employees regularly raise concerns, and possible resolutions are discussed and tracked. (V.I, Tr. 385.) As reflected in minutes of meetings held from June 2008 through December 2009, issues supposedly raised by Frazier and Mack also were raised and discussed at various Safety Meetings. (V.I, Tr. 387-390; V.II, EE 32.)

Finally, employees have raised issues through G4S' Safe to Say program and Employee Concerns Hotline, as well as by informal verbal or email complaint. (V.I, Tr. 383.)

In sum, the record is clear that employees and supervisors at all levels consistently have brought a litany of issues to management. (V.I, Tr. 250, 395.) It is also undisputed Frazier and Mack did so for years. As Frazier explained, "I've been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued throughout my entire tenure at Turkey Point." (V.I, Tr. 168.) Mack also testified he has been raising issues since his hire in 2002, and that everyone "spoke out" at security briefings. (V.I, Tr. 276.)

4. **Frazier And Mack Are Discharged After Failing To Meet Expectations In The Leadership Effectiveness Program.**

Prior to 2010, G4S, including its supervisors, had not been performing well at Turkey Point. (V.I, Tr. 391-392.) In response to client concerns, G4S implemented a leadership development program to improve the quality of its supervisors at Turkey Point and the other Florida Power facilities. (V.I, Tr. 111-112, 392.) As part of this program, MacDonald was hired in February 2009 as the first Leadership Development Manager at Turkey Point. (V.I, Tr. 97.)

The "marching orders" for the new Leadership Effectiveness Program (the "Program") were presented to Turkey Point management in late 2009, with an initial review of supervisors in early 2010 and additional reviews to be conducted annually. (V.I, Tr. 98, 112, 122, 142; V.II, EE 35.)

Based on the procedures outlined in the Program and forms created at G4S' corporate headquarters, MacDonald completed a "criteria worksheet" for each lieutenant and captain. (V.II, EE 35-36; V.I, Tr. 123-126.) Scores were entered on a master spreadsheet and converted to a summary with names highlighted in green for top performance, yellow for average performance and red for low performance. (V.II EE 40; V.I, Tr. 126.) Frazier and Mack were two of five supervisors who fell within the red zone – the bottom 20%, with Frazier scoring the lowest of all supervisors.

Mareth, MacDonald and Rodriguez reviewed the lowest performers, including Frazier and Mack. (V.I, Tr. 41, 98.) Information was gathered from a variety of sources, including feedback from direct reports of each supervisor, other tools designed to measure leadership effectiveness and observations of upper management and set forth in summaries put together by MacDonald. (V.I, GCE 13; V.I, Tr. 41-42, 102-103, 127-128.) Based on this information, Mareth recommended Frazier and a number of other lieutenants be discharged. (V.I, Tr. 101-102, 393.) G4S' corporate headquarters decided to discharge all who fell within the red zone, which was five individuals. (V.I, Tr. 46-47, 128, 393; V.II, EE 41.)

In addition to his poor performance on the leadership review, Mack was terminated for engaging in inappropriate conduct towards the Florida Power &

Light security manager, G4S' key client daily contact at Turkey Point. (V.I, Tr. 102, 394.) Specifically, Mack was loud and aggressive and used profanity during a discussion with the security manager. (V.I, Tr. 394.) Such conduct is a Level I offense under G4S' Progressive Discipline Policy, justifying discharge for a first offense. (V.II, GCE 17 at 10.) Based on Mareth's recommendation, G4S' corporate headquarters discharged Mack. (V.I, Tr. 54-55.)

VIII. STANDARD OF REVIEW

"When reviewing an order of the Board, [the Court is] 'bound by the Board's factual findings if they are supported by substantial evidence on the record as a whole.'" Lakeland Health Care Assocs., LLC v. NLRB, 696 F.3d 1332, 1335 (11th Cir. 2012) (internal citations omitted). The Court is "not obliged to stand aside and rubber-stamp [its] affirmance of administrative decisions that [it] deem[s] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Id. (Internal citations omitted). Rather, "the Board cannot ignore the relevant evidence that detracts from its findings." Id. citing Northport Health Svcs., Inc. v. NLRB, 961 F.2d 1547, 1550 (11th Cir. 1992). "When [the Board] misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence." Id. (Internal citations omitted).

IX. SUMMARY OF ARGUMENT

The Board's Decision and Order is erroneous and unsupported by substantial record evidence. First, the Board overruled the trier of fact, incorrectly finding Frazier and Mack were not statutory supervisors. As discussed below, the Board ignored unrebutted testimony and evidence establishing lieutenants possessed and exercised the independent judgment to discipline, promote (through evaluation), direct, and assign. Instead, the Board ignored the weight of record evidence and its own preponderance standard, improperly imposing a higher, unspecified, burden of proof on G4S. Because Frazier and Mack were statutory supervisors, they are not subject to the protections of the NLRA and allegations of unlawful discharge are moot. G4S urges this Court to concur with dissenting Member Miscimarra's opinion and find the Board majority's decision must be set aside.

Second, even if Frazier and Mack were not statutory supervisors, the Board erred in its analysis of their discharges. As to Frazier, the Board summarily concluded G4S disciplined him for engaging in protected concerted activity (i.e. raising complaints to management on behalf of subordinate officers), rather than evaluating G4S' motive for his suspension and termination (his failure to meet expectations in G4S' Leadership Effectiveness Program). As to Mack, although the Board considered one of G4S' motives for his termination (his inappropriate workplace conduct), it never considered his failure to meet expectations in the

Leadership Effectiveness Program. Thus, the Board erred by failing to properly apply its mixed-motive standard.

Had the Board done so, the record evidence establishes there was no nexus between protected concerted activity and the discharges. Moreover, even if there was such a nexus, the Board erred by ignoring G4S' affirmative "Wright Line" defense. Under that defense, G4S established it would have discharged Frazier and Mack in the absence of purported participation in protected concerted activity (i.e. their failure to meet G4S' expectations in connection with its Leadership Effectiveness Program). Of course, none of this analysis would have been necessary had the Board properly concluded Frazier and Mack were supervisors not protected by the Act.

In sum, the Board's decision is not supported by the record evidence, nor is it supported by applicable law. Thus, G4S' Petition for Review should be granted and the Board's Cross-Application for Enforcement denied.

X. ARGUMENT

A. The Board Erred in Concluding Frazier and Mack Were Not Supervisors Under the Act.

The Board erred by failing to find Frazier and Mack were supervisors. Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them,

> or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

One is a supervisor if "(1) he…has the authority to perform one of the twelve supervisory functions described in the statute; (2) the exercise of that authority requires the use of independent judgment; and (3) such authority is held in the interest of the employer." Lakeland Health Care Associates, 696 F.3d at 1336 (internal citations omitted). Supervisory status must be proven by a preponderance of the evidence. See Section 10(c). "The burden of showing something by a preponderance of the evidence ... simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." (V.II, 24, at 6).

Here, the Board erred by failing to find the preponderance of the evidence established Frazier and Mack exercised the independent authority to discipline, evaluate, direct, and assign work. Instead, as explained by dissenting Member Miscimarra, the majority applied an unspecified higher burden of proof, ignoring unrebutted evidence and testimony, and requiring G4S to disprove the Board's rank speculation as to what lieutenants did and did not do at Turkey Point.

1. The Board Ignored Record Evidence, Imposed An Improper, Artificial Burden Of Proof, And Erroneously Concluded Frazier and Mack Lacked Independent Judgment to Discipline Security Officers.

The Board majority misconstrued and ignored record evidence establishing lieutenants independently disciplined security officers. Lieutenants can – and have – independently imposed discipline on security officers in at least eight instances. (V.II, EE 16.) Rather than rely on this unrebutted evidence, the Board strained to discredit it, finding it irrelevant that lieutenants other than Frazier and Mack have disciplined security officers, and instead required proof that Frazier and Mack had done so. The Board further found the existence of detailed disciplinary guidelines negated any "discretion" Frazier and Mack may have exercised, and dismissed evidence of lieutenants issuing discipline as "sporadic." Finally, the Board discounted as "paper authority" the Employer's lieutenant job description. (V.III, 24 at 3, n.9) This higher burden of proof is contrary to the Board's own precedent and common sense. It is also contrary to the precedent of this Court, which, in Lakeland, rejected similarly strained analysis.

In Lakeland, the employer contended licensed practical nurses ("LPNs") were supervisors. The employer utilized a progressive discipline system under which employees could receive level one coachings (for minor infractions) or level two (for "serious failures of customer service standards") disciplinary coachings. Id. at 1336. The LPNs decided which level of coaching to impose. As here, the

Board found this was insufficient to evidence independent disciplinary authority. The Board further dismissed LPN coachings as "sporadic." Id. This court disagreed.

As to the first prong of the supervisory analysis, whether the LPNs had the authority to exercise one of the twelve indicia of supervisory authority, the Court found the Board improperly failed to credit the employer's evidence establishing supervisory status. Id. at 1337. Additionally, the Court rejected the Board's focus upon the fact that the LPNs only sporadically imposed discipline, holding "[t]he frequency with which an employee exercised disciplinary authority – cannot be determinative of the existence of supervisory authority." Id.

As to the second prong, whether the LPNs exercised independent judgment, the Board ruled the LPNs were not supervisors "reasoning that the record establishe[d] only that the LPNs [were] responsible for reporting employee misconduct." Id. at 1339. The Court disagreed, finding the Board disregard[ed] compelling and uncontradicted evidence to the contrary." Id. Specifically, the Court found the Board glossed over unrebutted testimony from a former LPN establishing she possessed the independent authority to discipline CNAs without higher level approval, and also decided whether to issue discipline in the first place. Id. The record further demonstrated the employer's employee handbook and level two coaching forms listed infractions that would require an LPN to exercise

independent judgment to determine what constituted ambiguous violations such as "negligence" or "fraud." Id. at 1340. The Court found that the Board, in rejecting this evidence, relied upon "speculative inferences from what the evidence could or might have shown." Id. For example, the Board took issue with the fact that, inter alia, the level two coaching form did not have a space for the LPN recommending the discipline to sign. Id. The Court also took issue with the Board's overemphasis on the fact that "[n]one of the LPNs who purportedly completed the Level Two coaching plan forms in the record testified…," noting instead that it was "not reason enough to ignore the undisputed testimony of the managers who testified as to their own knowledge regarding those LPN coachings." Id.

Finally, the Court found the Board incorrectly discounted the issuance of less severe level one coachings. According to the Court, the Board ignored uncontradicted evidence LPNs knew they were vested with discretion to impose level one coachings and that the outcomes of the coachings involved an independent evaluation and plan to address the particular infraction prospectively. Id. at 1342-1343. As a result, this Court granted the employer's petition for review.

As discussed infra, the instant case is remarkably similar. Here, as in Lakeland, the Court should not allow the Board to "ignore the relevant evidence that detracts from its finding." Id. at 1335. The Board also should not be

permitted to speculate, contrary to undisputed record evidence, what additional evidence *might* have shown. Rather, the Board is required to base its decision on the substantial record evidence as a whole. It has not done so.

a. The Board Erred In Flippantly Discounting Mareth's Testimony Establishing Frazier and Mack's Had The Authority And Independent Discretion To Discipline Officers.

As in Lakeland, the Board improperly ignored evidence that did not support its conclusion and elevated the burden of proof on the Employer. First, the Board erred in ignoring unrebutted testimony that G4S cloaked Frazier and Mack with supervisory authority, including the authority to discipline. Mareth testified that lieutenants, including Frazier and Mack, could issue discipline without seeking approval. As in Lakeland, Frazier and Mack admitted they held the authority to issue oral and written warnings and discipline.

The majority disregarded Mareth's testimony on the grounds that it consisted "chiefly of conclusory responses to leading questions by counsel…, [and he] did not describe what procedures, protocols, criteria, or other factors, if any, govern lieutenants' disciplinary actions." (V.III, 24, at 2). The Board also found "Mareth did not testify to a single specific instance in which a lieutenant had exercised discretion or independent judgment regarding discipline." (Id.)

This ignores the record. Member Miscimarra's dissent describes how the Board improperly raised the burden of proof on G4S and that the Board's findings

are not supported by substantial evidence in light of Mareth's unrebutted testimony. Essentially, the Board majority improperly elevated the preponderance of the evidence standard G4S was required to satisfy to demonstrate Frazier and Mack were statutory supervisors:

> Additionally, Mareth testified that where offenses are listed at two different levels of progressive discipline, lieutenants have discretion to impose discipline at either level. …
>
> [Mareth] testified that lieutenants could impose all forms of progressive discipline except termination without advance approval of a captain or other higher-ranking officer. **He also explained that lieutenants, on their own, could decide whether to issue discipline or alternatively to let an offense go unpunished or to use the incident as a 'coaching' opportunity.**

(Id. at 5.) (Emphasis added).

The Board majority further discredited Mareth's testimony on the ground that he "is several levels removed from the lieutenants in the [G4S'] hierarchy" and "there is no record evidence that he ever served as a lieutenant." (Id. at 2.) Ironically, it is the majority that speculates, not Mareth. Mareth is the Employer's project manager who works daily at Turkey Point. The ALJ credited Mareth's testimony, which was unrebutted. Frazier and Mack explicitly agreed with key points. Yet the Board conjured reasons not of record to discredit Mareth. Member Miscimarra took issue with this:

> Mareth was familiar with the lieutenants' duties, and only two managerial levels (an operations manager and five captains) separated the lieutenants and Mareth. Mareth had been in charge of security at

> Turkey Point for 3 years and had worked for the Respondent for 28 years.

(Id. at 5.)

As outlined in Employer Exhibit 3, lieutenants reported to captains, who reported to Mareth. (V.II, EE 3.) By any objective standard, Mareth was not too far removed to testify credibly about lieutenant job responsibilities and authority. Certainly, Mareth was more qualified to reach factual conclusions than members of the Board, who presumably have never set foot at Turkey Point. The ALJ likewise was more qualified to reach these conclusions – he heard the testimony and looked witnesses in the eye. Inexplicably, however, the Board chose to ignore Mareth's firsthand testimony and the ALJ's credibility finding, instead replacing them with unsupported speculation.[11] Making this more inexplicable, as Member Miscimarra pointed out, is that Mareth's testimony was not only unrebutted, but it was *confirmed* by both Frazier and Mack:

> And [Mareth's] testimony on disciplinary authority was *corroborated* by Frazier and Mack themselves. Frazier admitted that, as a lieutenant, he 'had the authority to issue oral and written warnings' and 'to issue discipline at least at certain levels.'

[11] In discounting Mareth's testimony, the Board essentially rendered a key evidentiary issue *sua sponte*. Counsel for the Acting General Counsel did not object at the Hearing to Mareth's testimony as without basis, nor did she argue in any of her briefs that Mareth did not have sufficient knowledge to testify about this issue. Had General Counsel tendered such an objection at the Hearing and had the ALJ sustained the objection, G4S would have had the opportunity to elicit additional testimony from Mareth on his foundational knowledge and/or brought forth other witnesses to testify on these facts. Since there was no objection, G4S had no reason to do so and this argument was waived.

> Both [Frazier] and Mack acknowledged that they had signed a 'Supervisory Requirements' document confirming that their job duties included imposing 'progressive discipline.' Frazier also conceded that he could have exercised 'independent judgment' in issuing discipline, but he never saw the need to issue discipline. No credited testimony contradicts this evidence.

(Id. at 5.)

The majority's unsupported attack on Mareth's testimony violates this Court's directive from Lakeland that the Board not ignore evidence, particularly unrebutted testimony, which undermines its desired conclusions. As Member Miscimarra noted, Mareth's testimony, "[t]aken as a whole..., was more than enough to establish Frazier and Mack possessed authority to discipline with independent judgment." (Id.) The Board chose to ignore this testimony, and, without basis and contrary to the ALJ, dismissed it.

b. The Board Majority Erroneously Discounted And Mischaracterized Uncontroverted Documentary Evidence Establishing Lieutenants Exercised Independent Judgment In Issuing Discipline.

The Board majority further erred by mischaracterizing uncontroverted evidence establishing Frazier and Mack were authorized to exercise independent judgment in disciplining.

i. Disciplinary Warnings.

The Board majority incorrectly determined disciplinary notices of record did not evidence supervisory status, instead finding "[they] show that whatever

authority to discipline the lieutenants may exercise, it is both routine and significantly limited by detailed instructions in [G4S'] attendance and progressive discipline policies." (Id. at 2.) The majority rationalized that the disciplinary infractions involved attendance and were "routine matters that do not involve the exercise of discretion: the security officer either was or was not absent or late for work or training." (Id.)

The majority is wrong. As Member Miscimarra explained:

> [Mareth's] testimony was corroborated by eight Employee Disciplinary/Corrective Action Notices recording various forms of discipline issued to five bargaining-unit guards by seven different lieutenants. These disciplinary notices covered a range of offenses--tardiness, absenteeism, failure to report to training on time, and damaging a vehicle--and the sanctions imposed ranged from oral warnings and written reprimands to 1-day suspensions. This discipline was issued pursuant to the Respondent's attendance and progressive discipline policies, which apply to discipline issued by all levels of the Respondent's management. **Those policies furnish guidelines for the level of discipline appropriate to various offenses, but they also recognize that a guard may commit an unlisted offense or that following the guidelines may not be warranted in some instances. Indeed, one offense listed at two progressive-discipline levels—'[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*' (emphasis added)--explicitly requires independent judgment.**

(Id. at 5.) (Emphasis added).

Additionally, the majority found disciplinary warnings issued by lieutenants were either too old or could not be used to satisfy the supervisory status burden for Frazier and Mack because they were issued by other lieutenants. However, there is

no reasonable rationale – or precedent – which requires putative supervisors issue discipline within a certain time frame. Barring evidence lieutenants had lost authority to issue discipline, the majority improperly discounted the disciplinary notices.

The majority also relied upon the fact that G4S did not introduce any disciplinary notices issued by Frazier or Mack or call either to testify. But, as detailed below, Frazier and Mack were terminated in part because they were not exercising their authority, such as issuing discipline to officers under their command. Thus, it is absurd to hold against G4S the fact that it did not introduce discipline issued by either Frazier or Mack. Moreover, as this Court noted in Lakeland, "[t]he frequency with which an employee exercises disciplinary authority—authority that, in an ideal workplace, will be exercised infrequently or sparingly—cannot be determinative of the existence of supervisory authority." 696 F.3d at 1338. This is particularly true where, as here, Frazier testified he never had reason to issue discipline and there is no evidence Mack shirked from doing so. (V.III, 24 at 5.)

Moreover, as Member Miscimarra points out:

> Finally, the majority rejects the disciplinary notices because they were prepared by 'lieutenants other than Frazier and Mack' and most were 'at least 2 years old.' Regarding the first point, the disciplinary notices demonstrate that the Respondent's lieutenants possess authority to discipline with independent judgment, and Frazier and Mack are lieutenants. **Even if Frazier and Mack refused to exercise the**

> **authority they possess, Section 2(11) requires only the possession of authority to carry out an enumerated supervisory function, not its actual exercise.**

(Id. at 6.) (Emphasis added).

Finally, the Board erred by concluding G4S did not enter a sufficient number of disciplinary notices issued by the lieutenants (in this case eight). There is nothing in the law that requires any particular number of disciplinary actions to prove the putative supervisors possess supervisory authority. As noted above, a supervisor does not control whether employees engage in misconduct. The relevant question is whether the supervisor disciplines when misconduct occurs. There is no record evidence Frazier and Mack declined to discipline because they were not authorized to do so. In fact, Frazier testified to the contrary. Absent that, the Board has no basis to discredit Mareth's testimony or the testimony of Frazier and Mack that they understood they had the authority to discipline.

ii. The Progressive Discipline Policy Does Not Negate The Exercise of Independent Judgment.

As the Court held in Lakeland, while it is true that discipline for some actions (i.e. sleeping on the job) does not require the exercise of independent judgment, "others, such as '[u]nauthorized disclosure of confidential information,' '[n]egligent conduct which results in the damage to the facility, or customer property,' 'harassment,' or 'fraudulent activity,' plainly cannot." Id. at 1339-1340.

In the present case, the Board ignored the progressive discipline policy's directive that lieutenants use discretion to impose discipline. Contrary to the Board's conclusion, the policy is clear that all supervisors, including lieutenants, have discretion in application of progressive discipline. For example, according to Section 4.13 of the policy, stated offenses and levels of offense are "only guidelines for use by management and supervisory personnel." (V.II, EE 17.)

The Board majority's finding leads to the conclusion that no individual applying detailed disciplinary guidelines exercises discretion. This does not withstand scrutiny. As noted by Member Miscimarra, in the present case, infractions such as "failure to meet satisfactory job performance or behavior standards *in the opinion of management*" and "negligent or careless acts that cause serious personal injury or property damage" necessarily require the exercise of independent judgment. In fact, even in the case of sleeping, the supervisor must first decide whether the individual was asleep. At a minimum, as in Bon Harbor Nursing & Rehabilitation Center, 348 NLRB 1062, 1063-1064 (2006) lieutenants exercise discretion by determining whether to take action, or do nothing. See also Oak Park Nursing Care Center, 351 NLRB 27, 29 (2007).

Additionally, as is the case here, it is well-established that it is irrelevant that the disciplinary actions that can be issued by a putative supervisor are only for the lower level infractions, if those infractions can lead to more serious discipline for

future acts of misconduct. See e.g. Madison Square Garden Ct, LLC, 350 NLRB 117 (2007); Sheraton Universal Hotel, 350 NLRB 1114, 1117 (2007); Bon Harbor Nursing & Rehabilitation Center, 348 NLRB at 1062; Oak Park Nursing Care Center, 351 NLRB at 27.

iii. The Board Erred In Concluding Frazier and Mack's Performance Evaluations Show They Could Not Exercise Independent Judgment In Disciplining.

Next, the majority concluded record performance evaluations suggest lieutenants were required to seek approval before issuing discipline:

> One of Frazier's performance evaluations instructed him to consult the progressive discipline policy and to get a captain's review before issuing discipline.

(V.III, 24 at 3.)

The Board misconstrues the performance evaluations in the record. As Member Miscimarra explained:

> The majority … asserts that Frazier was required to get a captain's review before issuing discipline, citing language from one of Frazier's performance evaluations that indicates that *lieutenants* would have prepared the forms. That evaluation states: 'Have more involvement with the Security Officers when disciplinary actions need to be issued. Review and use WNS policy 108 … for guidance when issuing any disciplinary actions and have the Captain review the disciplinary [sic] prior to giving it to the Officers.' **Read in context, this is not an instruction to get a captain's review before issuing discipline, as the majority contends. Rather, it is a criticism of Frazier for being insufficiently involved in the disciplinary process, and a directive to issue discipline as the duties of his position require.**

(Id. at 6.) (Emphasis added).

In short, the majority ignored some evidence, misconstrued other evidence, and turned other evidence on its head. As a result, its decision is not supported by substantial evidence in the record as a whole.

iv. The Board Erred In Concluding Lieutenants Lacked The Independent Judgment To Assign.

As the Board explained in Oakwood Healthcare, Inc.:

> the term 'assign' to refer[s] to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. … The assignment of an employee to a certain department … or to a certain shift … or to certain significant overall tasks … would generally qualify as 'assign' within our construction. . . . For example, there can be 'plum assignments' and 'bum assignments' -- assignments that are more difficult and demanding than others.

348 RB 686, 689 (2006).

As Frazier admitted, lieutenants have the authority to transfer security officers from one post to another without consulting with a supervisor before doing so, posts that at least some officers find more preferable than others. As such, since lieutenants can assign security officers to particular posts and choose to assign "plum" posts over "bum" posts, lieutenants have the authority to assign employees under Section 2(11). (V.I, 217-218.)

c. The Majority Improperly Speculated As To What The Evidence May Have Shown Rather Than What It Did Show.

In addition, in violation of this Court's guidance in Lakeland, the majority improperly speculated as to what the evidence *might* have shown as opposed to *what it did show*: that lieutenants such as Frazier and Mack possessed independent discretion to discipline subordinates. The majority concluded:

> there is no indication whether lieutenants exercised discretion in deciding to issue discipline at a certain level and then prepared and signed the disciplinary notices based on that decision, or whether they signed and delivered already-prepared notices at the behest of higher-ranking supervisors. There is some evidence in the record that suggests the latter possibility.

(V.III, 24, at 3.)

However, Member Miscimarra correctly refutes this conclusion, recognizing G4S was only required to establish supervisory status by a preponderance of the evidence, *not disprove tangential conjectures*:

> The majority first contends that the Respondent failed to disprove the possibility that the lieutenants were merely signing documents prepared by higher-ranking supervisors. Yet, the documents indicate on their face that they were prepared and signed by lieutenants. Under the applicable preponderance of the evidence standard, the Respondent was not required to exclude speculative possibilities.

(Id. at 6.)

This speculation further shows the lengths to which the Board has gone to twist the record.

2. The Board Incorrectly Found Evaluations Issued By Frazier and Mack Did Not Affect Subordinates' Promotional Opportunities.

The Board glossed over the fact that lieutenants complete annual and quarterly evaluations of security officers and discuss those evaluations with officers before any involvement by higher management. (V.I, Tr. 84, 205-206, 295, 328; V.II EE 4 and 10.) These facts are uncontroverted, as is the fact that lieutenants regularly and consistently issue evaluations without consulting with upper management, and the evaluations conducted by lieutenants generally are the only evaluations of security officers. (V.I, Tr. 84-85, 88-89, 206-207, 295-296, 330.)

The Board further erred in finding lieutenants' role in the evaluation process and impact on potential promotions insufficient to establish supervisory status. In reaching this conclusion, the Board held "we find that the Respondent has failed to carry its burden to prove that a lieutenant's evaluation, by itself, affects a security guard's promotion." (V.III, 12, at 3 (emphasis added.))

The Board did not apply the correct standard. The standard is not whether an evaluation, by itself, affects an employee's promotion, but whether an evaluation "affects" an employee's promotion. It is well-established that an

individual's "ability to affect the promotional opportunities of employees establishes supervisory authority." Entergy Systems & Service, Inc., 328 NLRB 902, 902-903 (1999) (supervisory authority found solely on the ability to block a promotion); Loretto Heights College, 205 NLRB 1134, 1136 (1973) (individuals are supervisors under Section 2(11) based, in part, on the fact that they effectively made recommendations with respect to promotions); Burns International Security Services, Inc., 278 NLRB 565, 571 (1986) (sergeants at a nuclear facility were supervisors based on significant role in evaluating employees).

Mareth testified, without contradiction, regarding four officers, whom he identified by name, for whom evaluations played a role in successful promotions. (V.I, Tr. 330, 333.) Mareth also testified that the same thing had occurred with respect to eight other officers in the preceding one and a half years. (V.I., Tr. 333-334.) Thus, the undisputed record evidence demonstrates lieutenant evaluations directly affect subordinate chances of promotions. Indeed, if only lieutenants issue evaluations, it stands to reason that those evaluations must receive strong consideration in the promotion process – there is little else to consider.

It is irrelevant that evaluations completed by lieutenants are not the only factor considered by the promotions board. What is relevant is whether the evaluations affect an officer's chance of promotion. See, e.g., Entergy Systems & Service, 328 NLRB at 902. Here, the undisputed facts demonstrate this is the case.

As a result, the Board erred by misapplying its own standard and failing to find lieutenants exercise independent discretion in evaluating security officers.

3. The Board Incorrectly Found Frazier and Mack Lacked The Authority To Responsibly Direct Security Officers.

The Board also reaffirmed the 2012's decision incorrect holding that lieutenants such as Frazier and Mack lacked the authority to "responsibly direct" employees. The Board has held:

> [For direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Oakwood Healthcare, 348 NLRB at 691-692.

In the present case, lieutenants are responsible for ensuring the quality of work performed by security officers and lieutenants who do not fulfill this responsibility may be disciplined or evaluated poorly, which can affect their opportunity for promotion. Therefore, since "some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly," lieutenants responsibly direct security officers. 348

NLRB at 691-692; see also Lakeland, 696 F.3d at 1346-1347 (Board ignored evidence that LPNs are held accountable for subordinates' shortcomings)

The undisputed testimony establishes lieutenants are responsible for the quality of the performance of security officers and, if the lieutenants do not fulfill that responsibility, they may be coached, disciplined or discharged. (V.I, Tr. 331-332.) For example, lieutenants are required to conduct certain drills for their security officers. (V.I, Tr. 332.) Four lieutenants (including Espinoza and Jean-Baptiste) were counseled on their failures to conduct drills. (V.II, EE 18 at 1-3, 7.) One lieutenant received the lowest score possible (1 out of 4) in a category on his evaluation for similar failures, a score that can affect his future promotion opportunities. (Id. at 7.)

The Board's 2012 decision held "[G4S]' exhibits on accountability all were warnings in which lieutenants were counseled for their own mistakes in training guards, not for the failings of the subordinates themselves." (V.III, 12, at 4.) However, this finding ignores that if a subordinate officer was improperly trained, and exhibited poor performance because of that lack of training, the training officer would be the direct cause of the subordinate officer's shortcomings. Thus, if a lieutenant fails to properly train subordinates, the lieutenant is in fact directly responsible for any substandard performance that may result. (V.I, Tr. 333.)

The Board majority also ignored that lieutenants exercise independent judgment in "responsibly directing" security officers since they make their own decisions how to counsel officers and suggest ways for improvement. (V.I, Tr. 201, 207.) For example, in Dunkirk Motor Inn, Inc., 211 NLRB 461, 462 (1974), the Board found an assistant housekeeper to be a statutory supervisor where she was responsible for "overseeing" the work of maids assigned to one of two floors of a motel. The assistant housekeeper's responsibilities included, among other things, inspecting the rooms the maids cleaned and ordering them to correct deficiencies. In finding that the assistant housekeeper responsibly directed the maids, the Board stated, "The test of responsible direction does not depend on the complexity and difficulty of the maids' work or of the corrective measures invoked. . . . The proper test . . . is that [the putative supervisor] exercises independent judgment without consultation with the housekeeper in ascertaining the deficiencies in the maids' work, however prosaic and uncomplicated, and utilizing the authority to order that the work be done correctly." Id. at 462.

Here, lieutenants determine the deficiencies in the security officers' work and have the authority to direct that the work be performed correctly. Therefore, like the assistant housekeeper in Dunkirk Motor Inn, lieutenants exercise independent judgment in responsibly directing the security officers that report to them.

4. The Majority Ignored Secondary Indicia of Supervisory Status.

Finally, the majority completely ignored secondary indicia of supervisory status. As noted by Member Miscimarra, the majority disregarded undisputed facts that lieutenants: earn more money than security officers; receive additional training, and are included in management meetings; are viewed as supervisors (including by the Union president); and if lieutenants are not supervisors, then each captain would be responsible for more than 40 employees, which is illogical. See e.g. American River Transportation Co., 347 NLRB 925, 927 (2006); Burns Security, 278 NLRB at 570.

In sum, the majority's finding that Frazier and Mack were not statutory supervisors is premised upon the mischaracterization of the record evidence and speculation as to what the evidence should have, or could have, shown. The Board further departed from its own precedent in stretching to find Frazier and Mack were not supervisors. These findings do not comport with this Court's decision in Lakeland.

B. Evan if Frazier and Mack Were Statutorily Employees Protected by The Act, The Record Evidence Establishes G4S Lawfully Terminated Their Employment.

The Board concluded G4S unlawfully disciplined Frazier and Mack because they raised complaints on behalf of subordinates. The authority the Board relied

upon in reaching this conclusion is inapplicable because it controls only in situations in which an employer is per se liable because it expressly discharged an employee directly and solely because of participation in protected concerted activity. Here, G4S discharged Frazier and Mack (as well as other lieutenants who are not alleged to have engaged in protected concerted activity) for failing to meet the many expectations of G4S' Leadership Effectiveness Program. Thus, the Board was required to evaluate G4S' motives under a "mixed-motive" analysis. Had the Board done so and considered the weight of the credible evidence of record, the Board would have found both discharges lawful.

Under the mixed-motive test, G4S conclusively demonstrated: (1) there was no causal connection between Frazier and Mack's purported protected concerted activity and their discharge; and (2) G4S would have discharged them irrespective of purported participation in protected concerted activity.

1. The Board Applied An Incorrect Analysis.

The Board erred by re-affirming the ALJ's April 30, 2013 decision finding Frazier and Mack were terminated specifically and solely because they engaged in protected concerted activity. If true, such conduct would be per se unlawful. Burnup & Sims, Inc., 256 NLRB 965, 976 (1981). This, however, was not the case. With almost no analysis, the ALJ, whose decision was rubber-stamped by the Board, reached this conclusion based upon the finding that "their bringing

complaints to management on behalf of the security officers and being on the side of the security officers constituted protected concerted activity." (V.III, 21, at 5.) However, both were discharged because they fell into the bottom 20% of lieutenant performance evaluations, which were comprised of many components. Rather than considering Frazier and Mack's evaluations in their entirety, the Board and ALJ viewed them in a vacuum, finding:

> The evaluations reflect that the performance of Frazier and Mack was found to be unsatisfactory because, rather than give full allegiance to management, they did not see themselves as 'part of management' but instead were 'on the security officer's side.'

(Id. at 5.)

The failure to "give full allegiance to management" is, at best, an abstract concept which significantly differs from cases in which the Board has found employees were terminated directly in retaliation for engaging in protected concerted activity. For example, the two cases cited by the ALJ for this erroneous conclusion in the present case are instructive. In Burnup & Sims, 256 NLRB at 976, the employer discharged employees specifically because they consulted with the Equal Employment Opportunity Commission and NLRB. Similarly, in CGLM, Inc., 350 NLRB 974 (2007), the employer discharged employees engaging in a protected strike. These two cases provide concrete examples of employers terminating employees specifically in response to unambiguous participation in protected concerted activity. This was not the case here which, at worst, involves a

"mixed motive." As discussed infra, Frazier and Mack, along with other lieutenants who are not alleged to have engaged in protected concerted activity, were terminated based upon poor results in G4S' Leadership Effectiveness Program. That program involved components other than reporting and responding to employee concerns. Accordingly, as discussed infra, the motive for terminating their employment should have been fully evaluated under the mixed motive analysis set forth in Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). [12]

2. Frazier and Mack's Terminations Were Lawful Under Wright Line.

Under the analytical framework set forth in Wright Line, to establish a prima facie case of discrimination under Section 8(a)(1) of the Act, a charging party must show: (1) he was engaged in protected concerted activity; (2) the employer knew of that activity; (3) the employer took an adverse employment action; and (4) there is a link or nexus between the protected activity and the adverse employment action.[13] If a prima facie case is established, the burden shifts to the employer to

[12] The Board's April 30, 2013 decision failed to evaluate G4S' motive in disciplining Frazier or Mack, specifically their failure to perform their supervisory functions. (V.III, 21, at 1, n. 2). Rather, the Board applied the Wright Line analysis solely to Mack's use of profanity shortly before his termination.

[13] Recent Board cases have erroneously suggested that the fourth prong is not part of the General Counsel's initial burden. Auto Nation, 360 NLRB No. 141 (2014)(but see Miscimarra dissent). However, at least one appellate court has rejected the Board's position on this specific

prove the affirmative defense that it would have taken the same action irrespective of the charging party's participation in protected activity. Finally, there must be a showing sufficient to support the inference that a charging party's protected activity was a substantial or motivating factor in the alleged adverse employment action. Wright Line, 251 NLRB at 1089.

Neither the Board nor the ALJ fully evaluated whether there was a nexus between the purported protected concerted activity and the adverse employment actions. The Board also failed to assess the Employer's affirmative defense.

a. The Record Establishes There Was No Nexus Between Protected Activity And The Decision To Discharge Frazier and Mack.

For many reasons, which the Board did not analyze, the record does not establish the requisite nexus between protected activity and the discharge of Frazier and Mack.

G4S reasonably believed lieutenants such as Frazier and Mack were supervisors. This good faith belief may not be held against G4S. The ALJ cited earlier Board precedent holding "[a]n employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act." (V.III, 21 at 5.) However, this line of

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issue. See AutoNation, Inc. v. NLRB, No. 14-2991, 2015 U.S. App. LEXIS 15771, at *21 (7th Cir. Sept. 4, 2015).

authority is inapposite because G4S was not attempting to prohibit *employees* from engaging in protected concerted activity. Rather, Frazier and Mack failed to adequately fulfill the very job responsibilities which rendered them statutory supervisors. The Board cannot have it both ways. On the one hand, it concludes an individual is not a supervisor if he does not exercise authority granted to him. On the other, it holds an employer cannot hold an individual accountable for refusing to supervise or otherwise not meeting supervisory expectations. This, of course, makes no sense. In any event, under these circumstances Frazier and Mack would not have been discharged because they engaged in protected activity; they would have been discharged because they declined to supervise and attempt to correct reported issues.

The ALJ relied on certain comments that appear in written reviews of Frazier and Mack to find they were terminated not because they failed to address issues, but because they raised complaints. Id. at 5. However, an analysis of those comments reflect that Frazier and Mack were not brought to task for raising issues, but for failing to work *as supervisors* to address those issues, instead simply bring concerns to the attention of upper management.[14] In fact, contrary to the ALJ's

[14] *See, e.g.*, (V.II, EE 19 at 2 (lieutenants are "responsible to maintain open communication with the security personnel under their command and receive and address concerns and issues enthusiastically and work to promptly resolve them") (emphasis added); V.II, EE 21 at 3-16 (lieutenants and captains must encourage the security officers under their command to raise issues, and act on those issues)).

finding, Frazier and Mack were credited, not criticized, because they "often appropriately challenge[d management] decisions." (V.II, GCE 7, §1; V.II, GCE 13, §1.) Such a conclusion is logical given that G4S has multiple processes and procedures in place to encourage all individuals employed at Turkey Point to raise issues and concerns. As such, Frazier and Mack were doing nothing more than what they had been encouraged, and instructed, to do, and what they have done throughout their careers. It was their failure, however, to address those concerns which was subject to scrutiny.

This is because unlike security officers, lieutenants must attempt to respond to and, if possible, address employee concerns as part of SCWE. (V.II, EE 19 at 2; V.II, EE 21 at 3-16.)[15] Thus, when viewed in context, it is clear that the comments

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[15] As one of the captains testified, and which the ALJ failed to note, lieutenants are expected to take immediate action and handle issues where possible, in response to officer concerns:

> Q. Are there ever any occasions where you expect lieutenants under your command to try to do something to respond to complaints raised by their officers?
>
> A. If the – I expect for my lieutenants to respond as quickly as possible to the concern, to the officer's concern. If it's immediate actions taken, I expect my lieutenants to take immediate actions and handle the situation accordingly.

(V.I, Tr. 91.)

Frazier corroborated this testimony and admitted lieutenants have such a responsibility, in addition to the responsibility to raise issues and concerns:

on which the ALJ relied do not establish causality. G4S was not critical of Frazier and Mack's role in raising concerns and challenging management decisions; it applauded them. G4S was critical, however, because Frazier and Mack failed to attempt to solve issues, not because they raised or agreed with those issues. Regardless of whether lieutenants are statutory supervisors, their job responsibilities included attempting to address issues raised by their subordinate officers, as opposed to merely relaying the issues up the chain of command.

Any claim of unlawful motive is further belied by SCWE and similar programs and procedures designed to encourage security officers, lieutenants and captains to bring to management's attention virtually any issues of concern, including each of the issues supposedly raised by Frazier and Mack. Indeed, G4S has an entire system, with multiple overlapping procedures, to ensure employees

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> Q. Mr. Frazier, do you admit that part of your responsibilities as a lieutenant were to try to resolve issues that were brought to your attention by security officers under your command?
>
> A. I believe that that is part of my nature, part of – yes, part of the responsibility of a lieutenant to bring to – to funnel up issues.
>
> Q. Now, in addition to funneling up, do you believe it was part of you responsibilities as a lieutenant that if a security officer brought an issue to your attention that was something that you believed you personally could do something about, that you had a responsibility to try to do that, to try to resolve the issue?
>
> A. Within the context of what the SFI [Security Force Instruction] allows me to do.

(V.I, Tr. 225; see also V.I, Tr. 214-215, 319, 352-353, 356-358.)

and statutory supervisors may raise issues and do so free from fear of retaliation. G4S has every interest in making sure its programs in this regard are sufficient, because of its own interest in a safe working environment, and the fact that these programs are required by G4S' client and the Nuclear Regulatory Commission. In short, any claim of a nexus is belied by the fact that G4S encourages protected concerted activity, specifically, the exact protected concerted activities in which Frazier and Mack supposedly engaged.

Moreover, it is undisputed that security officers, lieutenants and captains have brought issues to the attention of management virtually on a daily basis and have been doing so for years. Despite this, there is no allegation G4S terminated or otherwise took any detrimental employment action against any other individual. This further refutes the General Counsel's ability to establish a prima facie case pursuant to Wright Line. See, e.g., Sunrise Health Care Corp., 334 NLRB 903, 910 (2001).

This is also true of Frazier and Mack, who regularly raised issues without repercussion.[16] This is undisputed and further refutes the General Counsel's ability to establish its prima facie burden in connection with Frazier and Mack's

[16] Frazier admits he brought issues and concerns to the attention of management from 1989 through his termination, and Mack admits that he raised similar issues from 2002 until his termination. (V.I, Tr. 168 (Frazier has "been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued through my entire tenure at Turkey Point."); V.I, Tr. 276 (Mack raised such issues as a security officer and lieutenant).)

discharges. Sunrise Health Care Corp., 334 NLRB at 910. Significantly, there is no record evidence to explain why G4S suddenly terminated Frazier and Mack for doing something they had been doing for years, which they had been expressly instructed to do, and which other security officers, lieutenants and captains had been doing for years without retaliation. See, e.g., USC University Hospital, 358 NLRB No. 132 (Sept. 17, 2012).[17]

Finally, it is undisputed that many other employees have engaged in similar activity (reporting issues) for years. The Board gave no consideration whatsoever to its own precedent that an employer may rebut an inference of discrimination by showing other employees who were not engaged in protected activity were terminated for the same reason. Palms Hotel and Casino, 344 NLRB 1363, 1365-1366 (2005); Krystal Enterprises, Inc., 345 NLRB 227, 230 (2005); Smithfield Foods, Inc., 347 NLRB 1225, 1231-1232 (2006).

Here, in addition to Frazier and Mack, G4S terminated three other lieutenants (David Parris, Juan Martinez and Kimberly Millspaugh) for failing the leadership effectiveness review. (V.I, Tr. 46-47, 128, 393; V.II, EE 41.) As such, individuals who were not engaged in the same, alleged protected concerted

[17] The fact that G4S has attempted to resolve issues raised by Frazier and Mack further belies claims of unlawful causality. For example, Frazier admitted G4S "has attempted to resolve some of [the] issues that [he] raised through the years." (V.I, Tr. 222.) As explained above, after G4S solicited employee concerns and issues, it created a "living document" entitled "The First 48," which it updated to show the actions it had taken in response to specific issues. (V.II EE 26 and 46.) Thus, it is clear G4S did not begrudge issues raised by Frazier, Mack, and others, but instead addressed and resolved many of them.

activities were terminated for the same reason, a fact the Board failed to note. Incredibly, the Board and ALJ dismissed this critical piece of evidence, finding that because no charge was filed by these discharged employees, the legality of such discipline was never adjudicated. This is speculation at its worst.

The undisputed evidence shows G4S goes to great lengths to encourage all individuals employed at Turkey Point and companywide to raise virtually any and all issues of concern. It is also undisputed that Frazier and Mack did so for many years without any retaliation by G4S. It is inconceivable that G4S suddenly terminated them for engaging in conduct which they in which they had participated for years, and which G4S encouraged.

b. The Board Erred in Failing to Find G4S Would Have Discharged Frazier and Mack In the Absence of Alleged Participation in Protected Concerted Activity.

Even if the Board properly found participation in protected concerted activity was a substantial or motivating factor in Frazier and Mack's discharge, G4S satisfied its burden to establish the affirmative defense that it would have taken the same action in the absence of participation in protected concerted activity.

As explained above, it is undisputed that in early 2009, G4S implemented a program to improve the quality of lieutenants and captains at all of the nuclear sites

where it provides security services to Florida Power & Light, including Turkey Point. As part of this program, Dr. MacDonald was hired as the first Leadership Development Manager at Turkey Point, with one of her primary responsibilities to develop the leadership skills of lieutenants and captains.

The Board failed to consider that G4S' corporate headquarters developed a comprehensive process to analyze the leadership qualities of its lieutenants and captains. Headquarters put together instructions for Turkey Point's upper management to follow and forms to use in completing the first annual review under this Leadership Effectiveness Program. It is undisputed that, based on the first round of reviews under the Program, Frazier and Mack were in the bottom 20% of lieutenants and captains at Turkey Point, which meant they were in the "red zone" subject to further review, and ultimately terminated along with all other lieutenants in the bottom 20% red zone.

The Board and ALJ failed to consider that the leadership reviews considered more than just "supervisor effectiveness." Based on the leadership reviews of Frazier and Mack, the Board and ALJ found, without further analysis, that they were discharged "because, rather than giving full allegiance to management, they did not see themselves as 'a part of management' but instead were 'on the security officers' side.'" (V.III, 21 at 5.) However, and as described below, even if Frazier and Mack had received the highest scores possible in that category, they still would

have fallen into the bottom 20% based upon their reviews in other categories which do not touch on protected concerted activity.

Using the criteria and forms created by G4S' corporate headquarters, MacDonald completed a "criteria worksheet" for each lieutenant and captain. (V.II, EE 35-36; V.I, Tr. 123-126.) She then used those worksheets, additional documents and information, as well as feedback from the follow-up discussion on the bottom 20%. Regardless of the comments in Category 1 (Review of supervisor effectiveness), the scores on the initial criteria worksheet put Frazier and Mack into the bottom 20%, which led to their termination along with the three other lieutenants in the bottom 20%. (V.I, Tr. 41-42, 98, 102-103, 127-128.) Those initial criteria are not alleged to touch upon protected activity and would have independently resulted in Frazier and Mack falling into the "red zone."[18] The Board never considered this critical information which establishes the affirmative defense that Frazier and Mack would have been discharge in the absence of any participation in protected activity.

[18] On the initial criteria worksheet, Category 1 (Review of supervisor effectiveness) was broken down into four different criteria, in 1.1 through 1.4, with each lieutenant given a score on a scale of 1 to 5, with 5 the highest possible score. Frazier was given a score of 1 on each criterion; Mack was given three 2's and one 3 on these criteria. (V.II, EE 36, Thomas Frazier criteria worksheet, Cecil Mack criteria worksheet.) Even if the pair was given a score of 5 on each of those criterion (1.1 through 1.4),[18] Frazier would have received an overall score (or Rank) of 2.75 and Mack would have received an overall score (or Rank) of 3.0. Those scores would have placed them in the bottom 20% "red zone" and resulted in termination regardless of their purported protected, concerted activities. (V.II, EE 40 at 1.)

XI. CONCLUSION

Based upon the foregoing, the Board's decision is not supported by substantial evidence on the record as a whole, nor is it supported by controlling precedent. Wherefore, G4S requests that this Court vacate the NLRB's Decision and Order in all respects, grant G4S' Petition for Review and deny the NLRB's Cross-Application for Enforcement.

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XII. CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,398 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the foregoing Brief of Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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XIII. CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2015, I caused to be served a true and correct copy of the within and foregoing **PETITIONER/CROSS-RESPONDENT'S BRIEF** via the Court's electronic case filing system which will automatically serve the following counsel of record:

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